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No. 94-1288

Supreme Court, U.S.
FILED
FEB 22 1995
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

HIRAM WALKER AND SONS, INC.,

Petitioner,

vs.

ELLER & COMPANY, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

CHRISTIAN D. KEEDY
Counsel of Record
KELLEY DRYE & WARREN
Attorneys for Respondent
201 South Biscayne Boulevard
2400 Miami Center
Miami, Florida 33131
(305) 372-2400

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QUESTIONS PRESENTED FOR REVIEW

Questions presented for review are stated by the Petitioner. Eller & Company, Inc. does not agree that these issues are proper for review.

LIST OF PARTIES

The parties to the proceeding are:
Petitioner: The Aetna Insurance Company ("Aetna")
Respondent: Eller & Company, Inc. ("Eller")[1/]

It is Eller's position that Hiram Walker & Sons, Inc. ("Hiram Walker") has no standing to file this Petition, because it was judicially determined in the underlying litigation in February of 1988 that the proper party plaintiff was Aetna Insurance Company. This determination has been made by the United States District Court for the Southern District of Florida and affirmed by the Eleventh Circuit Court of Appeal.[2/]

It is unclear why the Petition identifies Kirk Line, R.B. Kirkconnell & Bro. Ltd., Jamaica Merchant Marine Atlantic Line, Indian River Transport, Inc. and the S/S MORANT BAY as Respondents on its cover page. The MORANT BAY was never a party to this litigation because it was never served. R.B. Kirkconnell & Bro. Ltd. and Jamaica Merchant Marine Atlantic Line were dismissed by the District Court on December 16, 1986, and this dismissal, which subsequently proved to be on erroneous legal grounds, was never appealed.[3/] Indian River settled its dispute with Aetna/Hiram Walker in December of 1989 and since then, has not been a party to this litigation.[4/]

1/ [Parent: Carey Energy Corporation]

2/ See Petitioner's Appendix, pages 36a, 69a, 74a, 83a. Throughout, references to the Appendix to Petition will be "Pet. App., p." To avoid duplication, the decisions in the Petition Appendix have not been reproduced here.

3/ See Pet. App., pp. 93a and 94a; Pet., p. 20.

4/ See Pet. App., p. 37a.

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The Respondent will rely upon and refer to the Appendix references provided in the Petition for Writ of Certiorari, and will use the page references provided therein identified as "Pet. App., p. ___."

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Hiram Walker has no standing to bring this Petition. In 1988, it was conclusively determined that the proper party plaintiff was Aetna Insurance Company. (*See* Pet. App., pp. 36a, 69a, 74a and 83a) The facts of this case are unique, and do not present a question of law of widespread significance. The legal holding is based on and limited to the specific unique factual findings made by the District Court, which the Eleventh Circuit has found not to be clearly erroneous. (*See* Pet. App., pp. 7a - 11a, and 28a)

The positions asserted by the Petitioner have the same lack of substance as the Eleventh Circuit found in Petitioner's argument in the third appeal which it described as "baseless" and "unfounded". (*See* Pet. App., pp. 8a and 12a)

OPINIONS BELOW

The only opinion below which is material to this Petition is the last decision of the Eleventh Circuit, which appears on pages 1a through 20a of the Appendix attached to the Petition. The appeal giving rise to that decision asked the Eleventh Circuit to hold that the factual determinations of the District Court for the Southern District of Florida were clearly erroneous. (*See* Pet. App., p. 7a) These factual

determinations appear in the District Court Findings of Fact and Conclusions of Law dated August 6, 1990 (***See*** Pet. App., pp. 36a through 52a) which were supplemented by the District Court by amendments contained in its Order of March 10, 1993. (***See*** Pet. App., pp. 21a - 24a)

The Trial Court has twice determined that Eller is entitled to limit its liability for the casualty which is the subject of this litigation to $500, because at the time the tank of Tia Maria was dropped, Eller was fulfilling the ocean carrier's obligation to deliver the cargo to the consignee. This determination is uniquely factual and based upon the terms of the ocean carrier's bill of lading.

STATUTES INVOLVED

Contrary to Petitioner's assertion, ***The Harter Act***, 46 U.S.C. § 190, ***et seq.***, has no application to this case, because the parties clearly contractually agreed in the bill of lading that the terms of ***The Carriage of Goods Sea Act (COGSA)***, 46 U.S.C. § 1300, ***et seq.***, would govern during the entire time the ocean carrier had possession of the Tia Maria. (***See*** Pet. App., pp. 14a, 33a and 45a)

STATEMENT OF THE CASE

Petitioner's "Statement of the Case" contains numerous errors and omissions. They range from relatively harmless to significant. Some of the Petitioner's statements are misleading "half truths". The Petitioner's sequential presentation of its Statement of the Case, particularly as it reflects early holdings of the District Court, is misleading

because it does not state the District Court's final conclusion. There is no question that the District Court originally, in denying Eller the benefit of the $500 per package limitation, erroneously concluded that Eller was acting outside of the scope of the obligations of Kirk Line (the ocean carrier) when the accident occurred. However, after further consideration in two trials and two appeals, the District Court stated clearly that it was its factual determination that Eller was acting within the scope of the ocean carrier's obligation to deliver the cargo of Tia Maria at the time of the accident. Thus, Eller was entitled to the $500 per package limitation. (*See* Pet. App., pp. 24a and 52a)

Another significant misrepresentation in the Petitioner's Statement of the Case is the suggestion that Hiram Walker is the Petitioner. As previously pointed out, the Petitioner is Aetna Insurance Company. Both the District Court and Eleventh Circuit generously deemed the plaintiff's pleadings constructively amended (*See* Pet. App., pp. 36a, 69a, 74a and 83a), but at this point, further generosity is unwarranted. Aetna actually being the plaintiff is significant, because it reflects reality in this case, and what occurs in the vast majority of ocean shipments. Shippers, consignees, and freight forwarders involved in the movement of cargoes in ocean commerce to and from the United States know very well that their claims for cargo damage against the ocean carrier or its agents, including independent contractors, will be limited to $500 per package, unless they declare the value of their cargo, and pay a significantly higher freight rate. However, they generally protect themselves from risks of loss or damage to their cargoes by insuring them. The cost of the necessary marine insurance is much less than the higher ocean freight which would be charged if the value of the cargo was declared to the ocean carrier to defeat its ability to limit its liability to $500 per package. Aetna

Insurance Company and all other insurers providing coverage for ocean cargoes moving to and from the United States are very aware that virtually all ocean carriers engaged in this trade use bills of lading which extend the $500 per package limitation to the entire time that the goods are in the custody of the ocean carrier, directly or through the activities of its agents and independent contractors. Nevertheless, over the years, marine insurers trying to appear as unwitting cargo owners have tried repeatedly to circumvent the $500 per package limitation. Aetna's petition here, as well as its course of handling the litigation below, is a clear example of that.

Aetna's assertion that the tank of Tia Maria was in good order and condition when it arrived and was discharged in Miami is inaccurate. The District Court's actual determination, which has been found by the Eleventh Circuit not to be clearly erroneous, was that the cargo of Tia Maria spilled both before it was loaded aboard the MORANT BAY and during the voyage from Kingston to Miami. (*See* Pet. App., pp. 76a and 84a)

Aetna's statement that "Hiram Walker, Kirk Line and Eller agreed that Hiram Walker alone was responsible for arranging transfer of the Tia Maria from the Kirk Line tank to the Indian River tank"[5/] is a misleading half truth, which originally misled the District Court to grant summary judgment in favor of the Plaintiff and to deny Eller the right to limit its liability. The full truth, as the District Court learned when the case was later tried, was that Eller and Kirk Line's activity would only have ended if Indian River had been able to pump the cargo out of the Kirk Line tank and a delivery receipt and gate pass were issued to Indian River. (*See* Pet.

[5/] *See* Petition, p. 13.

App., pp. 22a - 24a, 39a, 49a - 52a) Further, as the District Court ultimately learned, Kirk Line was paid a separate fee to do whatever was necessary to transfer physical possession of the Tia Maria to the consignee. (*See* Pet. App. p. 38a - 39a, 43a, 51a) On numerous occasions before the accident involved here, in discharging Kirk Line's responsibility, Eller had done what was necessary to provide gravity transfers for the Tia Maria cargoes when Indian River, the consignee's agent, had arrived without appropriate equipment for transfer by pumping. (*See* Pet. App. p. 5a and 43a) Petitioner's suggestion that transfer was complete upon mere alignment of the two trailers initially in this litigation and now, is misleading and inaccurate in light of the fact that the Eleventh Circuit found this factual determination not to be clearly erroneous. (*See* Pet. App. pp. 7a - 12a, 28a) The ocean carrier charged and was paid a fee reflected on its bill of lading for the work that Eller was doing at the time of the accident involved here. (*See* Pet. App. pp. 38a - 39a) Eller billed the ocean carrier for the work that was being done when the accident occurred, and the ocean carrier paid that bill. Because the shipper paid the carrier for the service, and the carrier in turn paid Eller, it is unreasonable, as the Eleventh Circuit concluded, to assert that this work was outside of the scope of the ocean carrier's responsibility to deliver the Tia Maria to the consignee.

An additional point that Petitioner has not clearly presented is that the tank in which the Tia Maria was carried from Jamaica to Miami belonged to the ocean carrier, Kirk Line, and was not capable of being used to transport this product on roads in the United States. Thus, as long as the Tia Maria remained inside that tank, it was in the actual physical possession of Kirk Line through its ownership of the tank, and its agent's physical control over the premises where the tank was located and the tank itself. Hiram Walker's

witnesses, and the witnesses of its agent, Indian River, clearly testified that as long as the Tia Maria remained in Kirk Line's tank, if it was damaged or the tank itself containing the Tia Maria was stolen, that would be Eller and in turn, Kirk Line's responsibility. (*See* Pet. App. pp. 50a - 51a)

REASONS FOR DENYING THE WRIT

THE DECISION BELOW PRESENTS NO IMPORTANT UNANSWERED QUESTIONS OR CONFLICTS WITH SUPREME COURT, FEDERAL CIRCUIT COURT AND STATUTORY LAW

(a) Maritime Claim[6/]

In the first section of the Petition, the Petitioner seems to be arguing, in part, that there is no federal jurisdiction because the claim is outside the scope of ***The Carriage of Goods by Sea Act***, 46 U.S.C. § 1300, ***et seq.*** This argument seems to lose sight of the fact that ***COGSA*** is a substantive body of law, and that the jurisdictional provision concerning maritime claims is set out in 28 U.S.C. § 1333. Further, Petitioner ignores the final factual determination, which the Eleventh Circuit affirmed as not clearly erroneous, that at the time of the casualty involved here, Respondent was fulfilling the ocean carrier's obligation to deliver

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[6/] The Respondent has used a similar heading here as used by Petitioner, but it is unclear what the significance of Petitioner's heading actually is. Respondent's heading is to facilitate the identification of the argument presented in opposition to that which appears on pages 16 through 18 of the Petition.

physical possession of the Tia Maria to the consignee's representative. The District Court determined, and the Eleventh Circuit affirmed, that when the tank was dropped, Eller was discharging the responsibility of Kirk Line to provide such handling as was necessary in the Port of Miami, following discharge of the cargo from the vessel that brought it from Jamaica, to transfer physical possession to the consignee. This was clearly within the scope of the ocean carrier's duty, based on the terms of and charges set out on the ocean carrier's bill of lading. Hiram Walker paid Kirk Line an additional $200 for this delivery service and that charge was stated on the bill of lading. (*See* Pet. App. p. 38a) Kirk Line, in turn, paid Eller $74.74 to provide this service. (*See* Pet. App. p. 38a)

In passing, it may be helpful to explain that in the ocean shipping business, there is a separation of services that are usually provided by companies like Eller to ocean carriers. These consist of stevedoring and terminal handling. Stevedoring refers to the actual loading or unloading of cargo from the ocean-going conveyance, which in this day and age is usually a ship or a barge. Terminal handling, on the other hand, consists of storing the cargo after it has been discharged from the ocean-going vessel, and moving it or otherwise handling it as may be necessary when the consignee or its agent, like Indian River in this case, arrives to pick up the cargo.[7/] Unfortunately, the fine distinction between activities which constitute stevedoring and those which

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[7/] Although not relevant here, in a situation where cargo is being shipped rather than received, the terminal handling would consist of receipt of the cargo at the port of loading, and its movement and placement at a temporary place of storage (point of rest) awaiting the arrival of and actual loading on the ocean carrying conveyance.

constitute terminal handling are not always clearly understood or delineated in reported decisions.

In the first section of the Petition, Hiram Walker acknowledged that: "By virtue of the bill of lading's 'clause paramount' Kirk Line applied COGSA to all stages of the shipment and at all times that the goods were in the custody of the carrier." (*See* Petition, pps. 16 - 17) But it goes on to assert that this court's decision in ***Robert C. Herd & Company, Inc. v. Krawill Machinery Corp.***, 359 U.S. 297 (1959) should be revisited because the courts below have expanded interpretation of that case beyond what was intended. This assertion is untrue in this case. The Petitioner goes on to suggest that:

> This case presents the important unanswered question of whether a terminal operator which is under no obligation to the carrier to undertake the act which results in damage in a non-maritime situs, although originally engaged by the carrier nevertheless, enjoys the limitation of liability provisions of an ocean bill of lading and the Carriage of Goods by Sea Act, both clearly maritime in nature and application. [Emphasis added; *See* Petition, p. 18]

There certainly is good reason that this question remains unanswered in this litigation, and that there is no reason for this Court to answer that question. That question has nothing to do with this case. Both the trial and appellate courts below have explicitly determined that at the time the Tia Maria was dropped, Eller was completing Kirk Line's obligation to deliver physical possession of the Tia Maria to Indian River, the consignee's representative. The Trial Court made that determination twice (*See* Pet. App., pp. 21a, 23a - 24a, 49a, 52a), and the Eleventh Circuit's last decision affirms that factual determination, characterizing the

Petitioner's argument that it was clearly erroneous as "baseless" and "unfounded." (*See* Pet. App., pp. 2a, 8a, 12a) Those characterizations would also apply to the Petitioner's assertion that the damage occurred at "a non-maritime situs". The accident involved here occurred within the confines of the Port of Miami in a terminal yard operated by Eller immediately adjacent to the dock where the MORANT BAY was unloading on the Friday immediately preceding the Monday on which Indian River arrived to pick up the Tia Maria. About the only way the situs of this accident could be more "maritime" is if it occurred aboard the ship.

Under any circumstances, the question of situs is not controlling. This Court has long held that the locality test is not controlling. ***Executive Jet Aviation, Inc. v. City of Cleveland***, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). The question is whether the operative facts show a substantial relationship between the activity giving rise to the incident and traditional maritime activity. ***Sisson v. Ruby***, 497 U.S. 358, 110 S.Ct. 2892 (1990); ***Foremost Ins. Co. v. Richardson***, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982). Clearly, the activity involved here is "traditional maritime activity."

(b) Clarity[8/]

The Petitioner's assertion that there is some "lack of clarity" concerning interpretation of ***Robert C. Herd & Co.***

[8/] The Respondent has used a similar heading here as used by Petitioner, but it is unclear what the significance of the Petitioner's heading actually is. The Respondent's heading is to facilitate the identification of the argument presented in opposition to that which appears on pages 18 through 19 of the Petition.

v. Krawill Machinery Corp., 79 S.Ct. 766, 359 U.S. 297 (1959), and cases interpreting it is inaccurate in general, but certainly is untrue concerning its application to this case. Both the Trial Court and the Eleventh Circuit found that the terms of the bill of lading were broad enough and clear enough to extend the $500 per package limitation to Eller, so long as the work that it was doing at the time of the accident was within the scope of the work which the ocean carrier had contractually undertaken based upon the terms of the bill of lading. (*See* Pet. App., pp. 2a, 4a, 21a, 23a - 24a, 39a, 52a) The Petitioner even acknowledges this. (*See* Petition, pp. 16 - 17). As previously noted, the Trial Court factually determined that Eller was performing the duties of Kirk Line at the time of the accident involved here, and the Eleventh Circuit, despite the Petitioner's argument to the contrary, found that that factual determination was not clearly erroneous.

The Petitioner in its argument entitled "Lack of Clarity" (*See* Petition, p. 18) alleges that Eller was acting "without authorization" or in some other manner outside the scope of its responsibility or usual work. This is simply untrue. The trial testimony reflected Kirk Line expected that Eller would do everything necessary to see that the Tia Maria and all other cargoes which it handled at the request of Kirk Line were delivered into the physical possession of the consignees. (*See* Pet. App., p. 43a) The Eller employees responsible for the actual delivery of the Tia Maria testified that on numerous occasions prior to this accident, Indian River had arrived without appropriate connections to pump the cargo out of the Kirk Line tank, and that gravity feeds had been successfully done. (*See* Pet. App., pp. 9a - 11a, 78a)

The Petitioner's argument that the subject bill of lading lacks clarity is not well taken. Its suggestion that a

literal reading of the relevant clause in the bill of lading could give rise to an interpretation that would have given Indian River benefit of the per package limitation is unreasonable. It would require the court to ignore the fact that the Kirk Line bill of lading contained a $200 charge to Hiram Walker for the handling that was necessary to deliver the cargo to the consignee after it was discharged from the ship. Eller in turn was paid by Kirk Line, and from previously unloading and delivering Kirk Line cargoes Eller knew that it was to do whatever was necessary to put the Kirk Line cargoes into the physical possession of the relevant consignees or their agents who arrived to pick them up. Eller was paid for this service by Kirk Line. Indian River, on the other hand, received its instructions from and was paid by Hiram Walker. Repeatedly the Petitioner is asking this court to consider legal issues which do not arise out of the facts of the underlying litigation.

The Petitioner's reference to ***Schiess-Froriep Corp. v. S/S FINNSAILOR***, 574 F.2d 123 (2d Cir. 1978), has no probative value. It merely is a Second Circuit decision which reverses the entry of a summary judgment, for the same reason that the Eleventh Circuit originally reversed the entry of a summary judgment in this case, i.e., because it found there were material issues of fact in dispute concerning on whose behalf the terminal operator was acting while loading cargo aboard a consignee's truck.

(c) Delivery[9/]

The only determination of liability in favor of the Petitioner was in 1987 when the District Court granted summary judgment against the Respondent upon a determination that its negligence caused the Tia Maria to be dropped and spilled in Miami. Eller has never disputed that its negligence caused the relevant accident, but it has always asserted that its liability was limited to $500. Also, in the District Court's original granting of the motion for summary judgment, it dismissed the plaintiff's claims against R.B. Kirkconnell & Bro. Ltd., and Jamaica Merchant Marine Atlantic Line, the actual vessel owner, because it had erroneously determined that Eller was not acting within the scope of its duties as an agent of Kirk Line at the time of the accident. Now, for the first time in the almost 9 years that this litigation has been pending, the Petitioner makes the inappropriate argument that the dismissal of Kirk Line and Jamaica Merchant Marine Atlantic Line is "law of the case" binding on Eller. This is preposterous. The history of this case reflects that the District Court's original determination that Kirk Line and Jamaica Merchant Marine Atlantic Line were not responsible for this loss was erroneous. The Eleventh Circuit's first and second opinions held that whether the cargo had left the possession of the ocean carrier at the time of the accident was a question of fact, and in its third opinion, the Eleventh Circuit recognized that the District Court's two decisions factually determining that the ocean

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[9/] The Respondent has used the same heading here as used by Petitioner, but it is unclear what the significance of this heading is. It is used by Respondent to facilitate the identification of the argument presented in opposition to that which appears on pages 19, 20 and 21 of the Petition.

carrier was still responsible for the Tia Maria at the time it was dropped was not clearly erroneous. In the appeals taken by the Petitioner, it argued on each occasion that the Eleventh Circuit should reverse the case because the District Court's factual determinations were clearly erroneous. On each of the last two occasions that the Eleventh Circuit has considered this case, it held that the District Court's factual findings were not clearly erroneous. Now, having repeatedly failed with that argument, the Petitioner asserts to this Court a legal argument which is erroneous. Legal determinations, right or wrong, which were made against parties other than Eller in this litigation are not binding upon Eller, i.e., they are not law of this case. But in any event, after this case was originally remanded by the Eleventh Circuit, the District Court recognized that its determination that the accident occurred after the ocean carrier's obligations had been fulfilled was wrong! The District Court's consistent factual determination after the summary judgment was reversed, which with equal consistency has been affirmed by the Eleventh Circuit, is that Eller was performing the ocean carrier's work when the accident occurred.

Next, Petitioner suggests that the Eleventh Circuit's most recent decision in this case conflicts with decisions of the Fifth and District of Columbia Circuits in ***F.J. Walker Limited v. M/V LEMONCORE***, 561 F.2d 1138 (5th Cir. 1977) and ***American President Lines, Ltd. v. Federal Maritime Board***, 317 F.2d 887 (D.C. Cir. 1962), respectively. That position is incorrect. Neither of these cases deal with contracts of carriage in which the provisions of ***COGSA*** were extended to the entire period of time that the carrier had custody of the cargo, unlike the situation before this Court. In the ***LEMONCORE***, ***supra***, the Fifth Circuit merely held that an ocean carrier was liable to the consignee of a shipment of frozen meat which was discharged faster

than it could be placed in a cold storage plant, which resulted in thawing damage to the meat. The statement that ***COGSA*** does not cover damage ashore is only accurate if the terms of the bill of lading have not extended the application of ***COGSA*** to cargo handling ashore, i.e., terminal operations. However, this is widely done and recognized to be appropriate as the Eleventh Circuit held here. ***See also Brown & Root, Inc. v. The M/V PEISANDER***, 684 F.2d 415 (5th Cir. 1981).

The ***American President Lines*** case, ***supra***, dealt with the custom and practice in the Port of New York "absent a special contract" concerning delivery of cargoes at an unspecified time prior to 1961. There is no basis upon which the Petitioner can suggest that the custom and practice prior to 1961 in the Port of New York was the same as it was in the Port of Miami in April of 1985. But more importantly, the terms of the contract of carriage in our case are "a special contract" which required physical possession of the cargo to be delivered to Indian River, and Hiram Walker paid Kirk Line for this service. This is supported by the terms of the bill of lading, and the fact that the Tia Maria was shipped in Kirk Line's tank which could not leave Eller's terminal. The factual circumstances of our case are unique, and involve a cargo that was not boxed, bottled, or packaged in any way. The physical transfer of possession, out of Kirk Line's tank, by pumping or gravity feed, had to occur for Eller to complete Kirk Line's responsibilities under its bill of lading.

(d) Property Delivery[10/]

Next, the Petitioner recognizing the weaknesses of its preceding arguments, asserts that if an ocean carrier or its agent negligently damaged the cargo in the process of completing the carrier's delivery obligation, they have no right to limit liability under the per package limitation of ***COGSA***. It is fair, equitable and adds certainty to the law for the agents of an ocean carrier fulfilling the carrier's obligation to a cargo owner to have duties and potential liabilities which are co-extensive with the ocean carrier for whom it acts. This is what has arisen since this Court's decision in ***Robert C. Herd & Co. v. Krawill Machinery Corp., supra.*** Today, because of the widespread incorporation of ***COGSA*** into bills of lading and the extension of all defenses available to the ocean carrier to its agents through the terms of bills of lading, shippers, consignees, freight forwarders, insurers of ocean freight, ocean carriers and their agents, including stevedores and terminal operators who act as independent contractors, all know of the existence and the

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10/ The Respondent has used the same heading here as used by Petitioner, but it is unclear what the significance of this heading actually is. It is used by Respondent to facilitate the identification of the argument presented in opposition to that which appears on pages 21 through 24 of the Petition.

ramifications of the "$500 per package limitation" which had its origin in ***COGSA***.[11/]

The suggestion that the Eleventh Circuit's decision below is in conflict with its decision in ***Phillip Morris v. American Shipping Co., Inc.***, 748 F.2d 563 (11th Cir. 1984) and the Fifth Circuit's decision in ***Baker Oil Tools, Inc. v. Delta S.S. Lines, Inc.***, 562 F.2d 938 (5th Cir. 1977) is inaccurate. Both of these cases involved situations where there was an interruption of the transportation that would not normally be contemplated under the ocean bill of lading. In the ***Phillip Morris*** case, ***supra***, the cargo was delivered to American Shipping over 60 days before the cargo was loaded aboard the carrying vessel, and there was an additional delay of approximately a month and a half after the cargo arrived at the port of discharge. Thus, the district court in that case concluded and the Fifth Circuit affirmed a determination that at least some of the damage occurred before the limitation provisions of the bill of lading would be applicable, and since the ocean carrier could not show what damage occurred during the reasonable period of time required for the transportation, the ocean carrier would be responsible for all the cargo damage. Similarly, in the ***Baker Tools*** case, ***supra***, the ocean carrier, without notice to the shipper, diverted its vessel to a different port and the cargo was never picked up. When the shipper discovered this, and sought to reclaim its

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11/ The ramifications are that if the value of the cargo is not declared and a higher freight rate paid, the ocean carrier and all of its agents and independent contractors will be entitled to limit damage claims against them to $500 per package, and if the shipper knows that the package is worth substantially more than $500, it has the option to protect itself with insurance, or by declaring a higher value to the ocean carrier and paying a higher freight rate.

cargo, it could not be located, and the Fifth Circuit held: "that Delta's [the ocean carrier's] unilateral cancellation of the port of call operated to terminate the limitation provision and that Delta continued to maintain custody of the equipment with the full liability exposure of a common law bailee," ***supra***, 562 F.2d 940. In both of these cases, the ocean carrier had caused delay in the cargo movement, and the courts found that to have been the basis upon which to deny the ocean carriers' right to limit their liability. There was no delay caused by the ocean carrier or its agent in our case.

(e) Deviation.[12/]

The Petitioner's final argument is tantamount to the assertion that anytime cargo is negligently damaged, that constitutes a deviation, which would defeat ***COGSA*** defenses, including the limitation provisions, because damage to the cargo was not what the shipper "bargained for, or expected."

There is no contradiction in the evidence that on numerous occasions before the accident involved here, Hiram Walker's agent, Indian River, had repeatedly arrived at the Port of Miami without the necessary equipment to pump the Tia Maria from the Kirk Line tank to the Indian River tank for in-land transportation. (***See*** Pet. App., pp. 9a and 77a - 78a) Although senior Hiram Walker officials testified they were unaware of the gravity feed, certainly Hiram Walker

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12/ The Respondent has used the same heading here as used by Petitioner, but it is unclear what the significance of this heading actually is. It is used by Respondent to facilitate the identification of the argument presented in opposition to that which appears on pages 24 and 25 of the Petition.

was charged with knowledge that its agent, Indian River, acquired over time, that gravity transfers were being made.

Next, the Petitioner asserts the risk of the gravity transfer was so great as to constitute a "deviation" or fundamental breach of Kirk Line's marine transportation contract. This argument requires this Court to ignore reality. Handling the large cargoes, which are loaded on and off ships and through the ports of this country, is dangerous work. The numerous decisions of this Court alone confirm that. Review of reported federal decisions would reflect hundreds, if not thousands of decisions, where large, heavy pieces of equipment are lifted with forklifts, cranes and/or other equipment resulting in damage to maritime cargo and/or injuries and death to seamen, longshoremen, and harbor workers. Lifting the Kirk Line tank to perform the gravity feed was not unusually dangerous. It had been done successfully on numerous occasions before this accident. (*See* Pet. App., p. 78a) The piece of equipment involved here had been used on many occasions to lift pieces of equipment as large as the Kirk Line tank without any difficulty. However, Eller has never disputed that it was negligent for its employee to get off the forklift and to walk away from the machine with the Kirk Line tank elevated. He should not have left the Kirk Line tank up in the air while the machine was unattended. He should have lowered the tank to the ground, and temporarily discontinued the unloading until whatever other equipment was needed was obtained. Regardless of whatever other issues may arguably have constituted negligence in this case, none of those created a situation where it can be said that there was a total destruction of the contractual relationship such that the terms of the bill of lading would no longer govern the relationship between Kirk Line, Eller and the cargo owner.

Also in the last section of the Petition, it is argued that the Eleventh Circuit's decision conflicts with the holdings of ***St. John's N.F. Shipping Corp. v. S.A. Companhia General Commercial Do Rio De Janeiro***, 44 S.Ct. 30, 263 U.S. 119 (1923) and ***Nemeth v. General S.S. Corp. Ltd.***, 694 F.2d 609 (9th Cir. 1982). There is no conflict with these decisions. The ***St. John's*** case, ***supra***, stands for the proposition that the shipment in 1918 of 800 barrels of rosin from New York to Brazil on deck of the Schooner ST. JOHN without explicitly disclosing in the bill of lading that the cargo was stowed on deck, when there was no custom and practice in New York to ship cargoes of this type on deck, imposed liability on the ocean carrier. This case was decided before the enactment of ***COGSA***, 46 U.S.C. § 1300, ***et seq.*** There is no issue or dispute in the underlying litigation concerning where or how the cargo of Tia Maria was stored aboard the MORANT BAY. Similarly the decision in ***Nemeth v. General S.S. Corp., Ltd., supra***, is of no value to the Petitioner's position. There, the Ninth Circuit reversed a district court's granting summary judgment limiting the ocean carrier's liability to $500 per package, based upon a determination that there was a material issue of fact in dispute concerning whether the shipper had declared to the ocean carrier that the goods that he was shipping were worth $22,000 creating a situation where he would have paid a higher freight rate, and the ocean carrier would have been deprived of its $500 per package limitation. There is no issue in our case concerning whether Hiram Walker declared the value of the shipment of Tia Maria. A point raised in the ***Nemeth*** case of significance, however, is its holding that:

> Mere negligence in the stowage or handling of cargo, which might be considered an inherent risk of shipping, is not a deviation.

Supra, 694 F.2d 609.

The evidence in the underlying case is clearly that the custom and practice was to effect a gravity transfer of the Tia Maria, when Indian River failed to bring the proper couplings to transfer the cargo by pumping (*See* Pet. App., pp. 77a - 78a), and regrettably the Eller employee negligently left the tank of Tia Maria suspended when he went to get another piece of equipment.

Petitioner in the last section of its brief asks this Court to consider a rule that would virtually open a floodgate of litigation to determine when negligence rises to a sufficient level to constitute a "deviation." Eller would suggest to this Court that would not be a way to clarify the rights and liabilities of the participants in marine transportation. Further, it would be particularly inappropriate in this case, where in the first instance this accident was caused by a failure directly attributed to the cargo owner, i.e., its agent's failure to bring appropriate equipment to the Port of Miami to accomplish transfer of the cargo by pumping. But in any event, there can be no deviation, because there had been a custom and practice between our parties of transferring this cargo by gravity feed. (*See* Pet. App., pp. 13a, 78a)

CONCLUSION

None of the issues raised by the Petitioner warrant review of the underlying litigation by this Court. The litigation below arises out of unique facts concerning how the cargo was shipped and ultimately delivered. There is no important unanswered question in this case and it does not involve a decision of the Eleventh Circuit which is in conflict

with a decision of other circuits. The Petition should be denied.[13/]

Respectfully submitted,

CHRISTIAN D. KEEDY
Counsel of Record
KELLEY DRYE & WARREN
Attorneys for Respondent
201 South Biscayne Boulevard
2400 Miami Center
Miami, Florida 33131
(305) 372-2400

13/ The Petition should also be denied because Hiram Walker & Sons, Inc. has been previously determined not to be a real party in interest in this litigation.